UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	01 AMA Docket No. F&V 916-1 & 917-1
	)	
Gerawan Farming, Inc.,	)	
	)	
Petitioner	)	
	)	
	and	
In re:	)	AMAA Docket No. 02-0008
	)	
Gerawan Farming, Inc.,	)	
	)	
Respondent	)	**Decision and Order**

PROCEDURAL HISTORY

On August 13, 2001, Gerawan Farming, Inc. [hereinafter Gerawan], filed a Petition[1] under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA]; the federal order regulating the handling of "Nectarines Grown in California" (7 C.F.R. pt. 916) [hereinafter the Nectarine Order]; the federal order regulating the handling of "Fresh Pears and Peaches Grown in California"

[1]Gerawan entitles its Petition "Petition to Modify the Nectarine and Peach Marketing Orders and Their Advertising Regulations and Assessments, to Exempt Petitioner from Various Provisions of the Nectarine and Peach Marketing Orders and Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

(7 C.F.R. pt. 917) [hereinafter the Peach Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71). Gerawan alleges that, beginning in the 1998-1999 crop year, assessments under the Nectarine Order and Peach Order used for speech and advertising violated Gerawan's free speech rights under the First Amendment of the Constitution of the United States. Gerawan seeks: (1) a declaration that the advertising and promotion under the Nectarine Order and Peach Order violate Gerawan's right to freedom of speech under the First Amendment of the Constitution of the United States; (2) an order that no assessments for advertising, promotion, or other speech-related purposes be collected from Gerawan under the Nectarine Order and Peach Order in the future; and (3) reimbursement of assessments paid by Gerawan under the Nectarine Order and the Peach Order which were used for speech-related purposes from and including the 1998-1999 crop year through the present (Pet. at 6).

On October 3, 2001, the Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], filed an answer denying the material allegations of the Petition and raising the following three affirmative defenses: (1) the Petition fails to state a claim upon which relief can be granted; (2) the Petition is barred by the doctrine of res judicata; and (3) the Petition is barred by the doctrine of collateral estoppel.

On September 26, 2002, the Agricultural Marketing Service filed a Complaint against Gerawan. The Agricultural Marketing Service filed the Complaint under the AMAA; the Nectarine Order; the Peach Order; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). The Agricultural Marketing Service alleges that, since May 1, 2001, Gerawan has failed to pay the full amount of assessments due on nectarines and peaches in violation of 7 C.F.R. §§ 916.41 and 917.37. The Agricultural Marketing Service seeks an order assessing Gerawan a civil penalty and an order requiring that Gerawan cease and desist from further violations of the Nectarine Order and the Peach Order (Compl. at 4). On November 19, 2002, Gerawan filed an answer admitting the material allegations of the Complaint, but stating the assessments which it failed to pay violate Gerawan's right to free speech protected under the First Amendment of the Constitution of the United States.

On January 2, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] consolidated the proceeding instituted by Gerawan under 7 U.S.C. § 608c(15)(A), *In re Gerawan Farming, Inc.*, 01 AMA Docket No. F&V 916-1 & 917-1, and the enforcement proceeding instituted by the Agricultural Marketing Service under 7 U.S.C. § 608c(14)(B), *In re Gerawan Farming, Inc.*, AMAA Docket No. 02-0008 (Order Consolidating Cases). On February 18-21, 2003, and September 8-9, 2003, the ALJ presided over a hearing in Fresno, California. Brian C. Leighton, Clovis, California, and

James A. Moody, Washington, DC, represented Gerawan. Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, represented the Agricultural Marketing Service. Gerawan called three witnesses and introduced 18 exhibits. The Agricultural Marketing Service called seven witnesses and introduced 72 exhibits.

On June 15, 2006, after Gerawan and the Agricultural Marketing Service filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding the requirement that Gerawan finance generic advertising under the Nectarine Order and the Peach Order abridges Gerawan's right under the First Amendment of the Constitution of the United States to freedom of speech; (2) exempting Gerawan from its obligation to pay withheld assessments that relate to promotion under the Nectarine Order and the Peach Order; (3) exempting Gerawan from its obligation to pay future assessments that relate to promotion under the Nectarine Order and the Peach Order; (4) ordering Gerawan to pay to the California Tree Fruit Agreement the amount of withheld assessments, plus interest, that relate to research projects and activities under the Nectarine Order and the Peach Order; (5) ordering Gerawan to cease and desist from withholding payment of assessments that relate to research projects and activities under the Nectarine Order and the Peach Order; and (6) denying the Agricultural Marketing Service's request for an order assessing a $150,000 civil penalty against Gerawan (Initial Decision at 56-59).

Gerawan and the Agricultural Marketing Service appealed to the Judicial Officer. On September 8, 2006, the Agricultural Marketing Service filed a response to Gerawan's appeal petition, and on September 29, 2006, Gerawan filed a response to the Agricultural Marketing Service's appeal petition. On October 3, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

DECISION

Decision Summary

Based upon *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and a careful consideration of the record, I conclude: (1) the requirement that Gerawan finance generic advertising under the Nectarine Order and the Peach Order does not implicate Gerawan's First Amendment right to freedom of speech; (2) generic advertising under the Nectarine Order and the Peach Order is government speech not susceptible to First Amendment compelled-subsidy challenge; and (3) Gerawan's failure to pay assessments violates the Nectarine Order and the Peach Order. Consequently, I: (1) reverse the ALJ's June 15, 2006, Initial Decision; (2) dismiss Gerawan's Petition, filed August 13, 2001, in which Gerawan seeks exemption from assessments imposed under the Nectarine Order and the Peach Order and used for generic advertising; (3) order Gerawan to comply with the AMAA, the Nectarine Order, and the Peach Order; (4) order Gerawan to pay all of its past due assessments under the Nectarine Order and the Peach Order; and (5) assess

Gerawan a civil penalty for its violations of the AMAA, the Nectarine Order, and the Peach Order.

Discussion

Glickman v. Wileman Bros. & Elliott, Inc.

The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), that generic advertising under the Nectarine Order and the Peach Order does not implicate the First Amendment right to freedom of speech of those compelled to fund the advertising. Specifically, the Supreme Court found the Nectarine Order and the Peach Order are comprehensive regulatory programs that have displaced many aspects of independent business activity, as follows:

> The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
>
> In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Wileman, 521 U.S. at 468-69.

The Court concluded that compelled funding of advertising that is part of comprehensive regulatory programs, such as the Nectarine Order and the Peach Order,

does not implicate the First Amendment and rejected a compelled speech analysis, as follows:

> Our compelled speech case law, however, is clearly inapplicable to the regulatory scheme at issue here. The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, cf. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943), require them to use their own property to convey an antagonistic ideological message, cf. *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 18 (1986) (plurality opinion), force them to respond to a hostile message when they "would prefer to remain silent," see *ibid.*, or require them to be publicly identified or associated with another's message, cf. *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 88 (1980). Respondents are not required themselves to speak, but are merely required to make contributions for advertising.

Wileman, 521 U.S. at 470-71.

The Court described the regulatory framework in which generic advertising does not implicate the First Amendment rights of those compelled to fund the advertising, as follows:

> Congress enacted the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.,* in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. § 602(1). Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices," § 602(4), these orders may include mechanisms that provide a uniform price to all producers in a particular market, that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6)(A), (7), that determine the grade and size of the commodity, § 608c(6)(A), and that make an orderly disposition of any surplus that might

> depress market prices, *ibid*. Pursuant to the policy of collective, rather than competitive, marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6)(D), (H), (I). The expenses of administering such orders, including specific projects undertaken to serve the economic interests of the cooperating producers, are "paid from funds collected pursuant to the marketing order." §§ 608c(6)(I), 610(b)(2)(ii).
>
> Marketing orders must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. § 608c(9)(B). The AMAA restricts the marketing orders "to the smallest regional production areas . . . practicable." § 608c(11)(b). The orders are implemented by committees composed of producers and handlers of the regulated commodity, appointed by the Secretary, who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels. 7 CFR §§ 916.23, 916.62, 917.25, 917.30 (1997). The committees also determine the annual rate of assessments to cover the expenses of administration, inspection services, research, and advertising and promotion. §§ 916.31(c), 917.35(f).
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> Among the collective activities that Congress authorized for certain specific commodities is "any form of marketing promotion including paid advertising." 7 U.S.C. § 608c(6)(I). The authorized promotional activities, like the marketing orders themselves, are intended to serve the producers' common interest in disposing of their output on favorable terms. The central message of the generic advertising at issue in this case is that "California Summer Fruits" are wholesome, delicious, and attractive to discerning shoppers. See App. 530. All of the relevant advertising, insofar as it is authorized by the statute and the Secretary's regulations, is designed to serve the producers' and handlers' common interest in promoting the sale of a particular product.

Wileman, 521 U.S. at 461-62 (footnotes omitted).

Gerawan argues and the ALJ concludes that *Wileman* is inapposite because the tree fruit industry is now more competitive than during the time period covered by *Wileman*. However, I find the Nectarine Order and the Peach Order have not substantially changed

since the Supreme Court concluded that the business entities that are compelled to fund generic advertising under the Nectarine Order and the Peach Order "do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Wileman*, 521 U.S. at 469. The Nectarine Order and the Peach Order continue to provide for committees to administer the orders (7 C.F.R. §§ 916.20-.34, 917.16-.35), specify the expenses the committees can accrue and the assessments that must be paid (7 C.F.R. §§ 916.40-.42, 917.36-.38), limit the research that the committees can conduct (7 C.F.R. §§ 916.45, 917.39), require reports to be filed by regulated persons (7 C.F.R. §§ 916.60, 917.50), regulate the containers that may be used for nectarines and peaches and the packing of nectarines and peaches (7 C.F.R. §§ 916.350, 917.442), establish procedures for the nomination and selection of committee members (7 C.F.R. §§ 916.20-.27, 917.16-.27), and specify the grade and size of nectarines and peaches that may be marketed (7 C.F.R. §§ 916.356, 917.459). In the years since the *Wileman* decision, there have been minor amendments to the Nectarine Order and the Peach Order (CX 11);[2] however, these amendments have not changed the fundamental characteristics of the Nectarine Order and the Peach Order as described by the Court in *Wileman*.

The Agricultural Marketing Service concedes that handlers of tree fruit have always competed intensely for customers. The ALJ appears to believe that the presence

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[2]The Agricultural Marketing Service's exhibits are designated by "CX."

of competition among handlers of nectarines and peaches negates the applicability of *Wileman*. However, nowhere in *Wileman* does the Court find there was no competition among handlers. Instead, *Wileman* makes clear that it applies where marketing orders have displaced many, but not all, aspects of independent business activity: "California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by antitrust laws." *Wileman*, 521 U.S. at 469.

Gerawan further argues that *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), overruled *Wileman* (Gerawan's Response to AMS' Appeal Pet. at 4). In *United Foods*, the Supreme Court held that assessments imposed on fresh mushroom handlers pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the Mushroom Act], to fund advertisements promoting mushroom sales violated the First Amendment right to free speech where the assessments were not ancillary to a more comprehensive program restricting market autonomy and the advertising was the principal object of the regulatory scheme. However, the Court did not overrule *Wileman*, as Gerawan argues, but, instead, expressly reiterated the constitutionality of assessments imposed on handlers to fund advertisement of California tree fruit by distinguishing *United Foods* from *Wileman*, as follows:

> The program sustained in *Glickman*[3] differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.
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> In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case we emphasized "the importance of the statutory context in which it arises." *Id*. at 469. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.* at 469. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from antitrust laws." *Id.* at 461. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices. *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "[d]id so as a part of a broader collective enterprise in which their freedom to act [wa]s already constrained by the regulatory scheme." *Id.* at 469. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.
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> The features of the marketing scheme found important in *Glickman* are not present in the case now before us.

United Foods, Inc., 533 U.S. at 411-12.

I conclude *Wileman* is dispositive of this case and compelling Gerawan to pay assessments under the AMAA, the Nectarine Order, and the Peach Order does not violate Gerawan's First Amendment right to freedom of speech. Further, I conclude Gerawan's failure to pay assessments violates the AMAA, the Nectarine Order, and the Peach Order.

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[3]The Court in *United Foods* refers to *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), as "*Glickman*."

Johanns v. Livestock Marketing Ass'n

Moreover, I conclude advertising under the Nectarine Order and the Peach Order is government speech. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the Supreme Court upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. The Court concluded that generic advertising constitutes government speech not susceptible to compelled-subsidy challenge under the First Amendment if the generic advertising is authorized by statute, funded by targeted assessments on producers of the agricultural commodity in question, and constitutes a message established and effectively controlled by the federal government, as follows:

> The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Livestock Marketing Ass'n, 544 U.S. at 563-64.

The advertising programs under the Nectarine Order and the Peach Order are identical in all material respects to the beef advertising program at issue in *Livestock Marketing Ass'n*. The AMAA authorizes the Secretary of Agriculture to issue marketing orders (7 U.S.C. § 608c(1) (Supp. V 2005)). Like the Beef Promotion and Research Act of 1985 [hereinafter the Beef Act], the AMAA authorizes generic advertising and

establishes the federal policy of promoting and marketing specific agricultural commodities (7 U.S.C. § 608c(6)(I) (Supp. V 2005)). Like the promotional program under the Beef Act, the promotional programs under the Nectarine Order and the Peach Order are funded by targeted assessments on producers of the agricultural commodity in question. Advertising and promotional messages issued under both the Nectarine Order and the Peach Order are controlled by the federal government. As in the beef promotion program, the Secretary of Agriculture exercises final approval authority over every word used in every promotional campaign for the nectarine promotion program and the peach promotion program (Tr. 737-39).[4] A United States Department of Agriculture representative attends and participates in Nectarine Order and Peach Order committee meetings (Tr. 726). Members of the Nectarine Order and Peach Order committees are appointed by the Secretary of Agriculture and can be removed by the Secretary of Agriculture (7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30). The Secretary of Agriculture reviews and approves budgets for promotional activities and projects and ensures compliance with United States Department of Agriculture policies (Tr. 1137-38, 1234). Nectarine and peach promotion proposals are reviewed by United States Department of

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[4]In this Decision and Order, I designate transcript references by “Tr.” The record contains two transcripts of the hearing. The first transcription of the hearing, which the ALJ designated as the “Initial Transcript,” is not a complete transcription of the hearing. York Stenographic Services, Inc., prepared a second transcription of the hearing, which the ALJ designated as the “Final Transcript” and which is a complete transcription of the hearing. The ALJ noted on each volume of the “Initial Transcript” that it is superceded by the “Final Transcript.” All references in this Decision and Order are to the “Final Transcript.”

Agriculture employees for compliance with statutory requirements and United States Department of Agriculture guidelines and policy and United States Department of Agriculture employees direct changes to be made in promotion programs, if necessary (Tr. 1234-36). Only after this review and oversight procedure is completed does the United States Department of Agriculture grant final approval for the implementation of a promotion project. After the promotional items are produced, the Agricultural Marketing Service reviews them for compliance with its guidelines, policies, and statutory requirements (Tr. 1242-43).

In *Livestock Marketing Ass'n*, the Court explained that the beef promotion program is government speech because Congress directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." *Livestock Marketing Ass'n*, 544 U.S. at 561. Here, likewise, the promotion programs under the Nectarine Order and the Peach Order are directed by Congress. The AMAA authorizes the establishment of marketing and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of certain agricultural commodities, including nectarines and peaches, and provides that the expense of such projects is to be paid from funds collected pursuant to marketing orders (7 U.S.C. § 608c(6)(I) (Supp. V 2005)). The Nectarine Order and the Peach Order each provide for the collection of funds from handlers of the products for promotion.

> "Compelled support of government"--even those programs of government one does not approve--is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." [*Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000)].

Livestock Marketing Ass'n, 544 U.S. at 559.

In both the nectarine promotion program and the peach promotion program, like the beef promotion program, the message of the promotional campaigns is effectively controlled by the United States government. The degree of governmental control over the message funded by targeted assessments distinguishes these promotional programs from the state bar's communicative activities which were at issue in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Ass'n*, 544 U.S. at 561-62.

"When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Livestock Marketing Ass'n*, 544 U.S. at 562.

Here, the nectarine and peach promotion programs are subject to political safeguards more than adequate to set them apart from private messages.

> The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the

> program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Livestock Marketing Ass'n, 544 U.S. at 563-64 (footnotes omitted).

I conclude the instant case cannot be distinguished from *Livestock Marketing Ass'n*, and advertising under the Nectarine Order and the Peach Order is government speech.

Gerawan's Appeal Petition

Gerawan raises one issue in its appeal petition. The ALJ concluded, since research is conduct (not speech), Gerawan must pay that portion of the assessments under the Nectarine Order and the Peach Order that relates to research. Gerawan argues that the ALJ's conclusion is error. Gerawan contends research is worthless without disclosure of the information researched, the results of the research, and the reaction to the research; therefore, forcing Gerawan to pay for research performed pursuant to the Nectarine Order and the Peach Order violates Gerawan's First Amendment right to freedom of speech and Gerawan is exempt from paying assessments related to research.

Even if I were to find that research is speech (which I do not so find), I would reject Gerawan's contention that assessments under the Nectarine Order and the Peach Order used for research violate Gerawan's First Amendment right to freedom of speech. As discussed in this Decision and Order, *supra*, based upon *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550

(2005), and a careful consideration of the record, I conclude: (1) the requirement that Gerawan finance generic advertising under the Nectarine Order and the Peach Order does not implicate Gerawan's right under the First Amendment to freedom of speech; and (2) generic advertising under the Nectarine Order and the Peach Order is government speech not susceptible to First Amendment compelled-subsidy challenge.

Appropriate Sanction

The AMAA authorizes civil penalties for violations of marketing orders, such as the Nectarine Order and the Peach Order, issued under the AMAA.

§ 608c. Orders

. . . .

(14) Violation of order

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's

> principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[5]

In determining the amount of the civil penalty for violations of the Nectarine Order and the Peach Order, certain factors should be considered including:

> nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to [the violator], and any other circumstances shedding light on the degree of culpability involved.

In re Onofrio Calabrese, 51 Agric. Dec. 131, 155 (1992).

I have reviewed the recommendation of the Agricultural Marketing Service regarding a civil penalty. I have examined the factors to be considered for determining the amount of the civil penalty. I examined the actions of Gerawan as these actions relate to the factors. I find that intentional violations of the Nectarine Order and Peach Order's requirements that a handler shall pay assessments are serious violations of the AMAA, the Nectarine Order, and the Peach Order. Therefore, I conclude a significant civil penalty is warranted to deter Gerawan, as well as other handlers, from committing similar violations in the future.

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[5]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 note, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B) (Supp. V 2005)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(vii) (2005)).

The appropriate civil penalty for Gerawan's failure to pay assessments since May 2001 is $100,000. Moreover, in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), in which the Supreme Court held that generic advertising under the Nectarine Order and the Peach Order does not implicate the First Amendment right to freedom of speech of those compelled to fund the advertising and in which Gerawan was a party, I do not find that Gerawan filed and prosecuted its August 13, 2001 Petition in good faith. I conclude that assessment of a $100,000 civil penalty against Gerawan is sufficient to deter Gerawan from continuing to violate the Nectarine Order and the Peach Order and will deter others from similar future violations.

Findings of Fact

1. Gerawan is a California corporation with its principal place of business in California (Pet.¶ 1a.).

2. Gerawan is a large producer and handler of California nectarines and peaches and subject to the Nectarine Order and the Peach Order (Pet. ¶ 2).

3. The AMAA was enacted to establish orderly marketing conditions for agricultural commodities. The AMAA authorizes the Secretary of Agriculture to issue marketing orders applicable to handlers (7 U.S.C. § 608c(1)). The Secretary of Agriculture promulgated the Nectarine Order (7 C.F.R. pt. 916) and the Peach Order (7 C.F.R. pt. 917) pursuant to the AMAA.

4. The AMAA authorizes the Secretary of Agriculture to include within marketing orders provisions for generic advertising and promotion. Specifically, the AMAA provides that marketing orders may contain terms and conditions providing for “production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order” and “such projects may provide for any form of marketing promotion including paid advertising.” (7 U.S.C. § 608c(6)(I) (Supp. V 2005).)

5. The Secretary of Agriculture administers the Nectarine Order and the Peach Order through the Agricultural Marketing Service (7 C.F.R. §§ 2.22(a)(1)(viii)(G), 2.79(a)(8)(viii)). The Nectarine Order and the Peach Order constrain the market autonomy of regulated entities. The Nectarine Order and the Peach Order provide for: (a) a committee to administer the orders (7 C.F.R. §§ 916.20-.34, 917.16-.35); (b) appointment of committee members by the Secretary of Agriculture (7 C.F.R. §§ 916.23, 917.19); (c) the expenses the committees can accrue and the assessments that must be paid (7 C.F.R. §§ 916.40-.42, 917.36-.38); (d) the research the committees can conduct (7 C.F.R. §§ 916.45, 917.39); (e) the reports that must be filed by persons regulated by the orders (7 C.F.R. §§ 916.60, 917.50); (f) container and pack regulations for peaches and nectarines (7 C.F.R. §§ 916.350, 917.442); (g) nomination and selection

of committee members (7 C.F.R. §§ 916.20-.27, 917.16-.27); and (h) regulation of the grade and size of peaches and nectarines that can be marketed (7 C.F.R. §§ 916.356, 917.459).

6. The Nectarine Order and the Peach Order are administered by the California Tree Fruit Agreement, which operates under the direction of the respective marketing order committees. The California Tree Fruit Agreement holds public meetings at which issues of importance to the nectarine and peach industries, such as container and pack requirements or quality standards, are discussed. The committees then establish subcommittees as necessary to handle issues such as domestic promotion, international promotion, inspection and compliance, grade, and size. The subcommittee members are typically handlers and/or growers of tree fruit, and reflect the knowledge and expertise of the tree fruit industry. (Tr. 559-70.)

7. Subcommittees make recommendations to the nectarine and peach committees. If a recommendation is approved by the committee, it is forwarded to the Secretary of Agriculture for final approval (Tr. 567-70, 1137-38; 7 C.F.R. §§ 916.30(d), 917.33(d), 917.35). After approval by the Secretary of Agriculture, notice and comment rulemaking is commenced to implement the recommended regulation (Tr. 1142-44).

8. The Secretary of Agriculture controls the administration of the Nectarine Order and Peach Order. An Agricultural Marketing Service employee attends nectarine and peach committee meetings (Tr. 1136-37, 1230, 1233). The Secretary of Agriculture

reviews and approves all nectarine and peach committee budgets (Tr. 1137). The Agricultural Marketing Service requires that nectarine and peach committee actions conform with Agricultural Marketing Service policies and directives before the Agricultural Marketing Service approves nectarine and peach committee budgets (Tr. 1137-39). If the Agricultural Marketing Service does not approve a project or expense listed in the budget, the nectarine committee and peach committee cannot engage in that activity. In addition, the Secretary of Agriculture approves any newsletters produced by the nectarine committee or the peach committee, as well as other activities that the committees conduct (Tr. 1232). The Secretary of Agriculture has authority to prohibit the nectarine committee and the peach committee from engaging any activity (Tr. 1138; 7 C.F.R. §§ 916.62, 917.30).

9. The Agricultural Marketing Service has guidelines and policies regarding the advertising conducted by the nectarine committee and the peach committee (Tr. 1152). Those guidelines include requirements that (a) all advertising be factual, (b) the advertising not disparage another commodity, (c) the advertising conform to Federal Trade Commission standards for advertising, and (d) the promotion not favor one handler over another (Tr. 1151-53). When the Agricultural Marketing Service believes that a promotional item is inconsistent with its policies, the Agricultural Marketing Service reviews the items and requires changes, if necessary. The Agricultural Marketing Service reviews and approves promotional items. (Tr. 1138.) When the Agricultural

Marketing Service has a question about a promotional item's compliance with its policies, it will check with other federal agencies, including the Federal Trade Commission, to ensure that the item complies with pertinent laws on truth in advertising (Tr. 1151-54).

10. Every year the nectarine committee and the peach committee make recommendations to the Secretary of Agriculture for changes in marketing order requirements because of the continually changing nature of the tree fruit industry (CX 11, CX 12). The Nectarine Order and the Peach Order are comprehensive regulatory programs that have displaced many aspects of independent business activity.

11. The Nectarine Order and the Peach Order impose inspection requirements to ensure that nectarines and peaches meet regulatory requirements (7 C.F.R. §§ 916.55, 917.45).

12. Both the Nectarine Order and the Peach Order require the payment of assessments to fund generic advertising. The advertising process begins with the submission of a budget to the Agricultural Marketing Service for approval. The budget includes an amount the committees propose to spend on advertising. If the budget is approved by the Agricultural Marketing Service, the California Tree Fruit Agreement undertakes the promotion of the commodities in the manner that it determines is most cost-effective (CX 79). The California Tree Fruit Agreement utilizes a variety of promotional formats to promote commodities. All advertising must be factually accurate and contain a generic message that promotes California tree fruit.

13. Starting on May 1, 2001, Gerawan shipped peaches and nectarines that were subject to assessments under the Nectarine Order and the Peach Order, but failed to pay the full assessments owed on those peaches and nectarines (CX 71). Gerawan believed that the assessments for generic advertising and promotional activities under the Nectarine Order and the Peach Order were not constitutional based upon the Supreme Court decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). Gerawan withheld from the assessments required to be paid under the Nectarine Order and the Peach Order approximately one-half of the amount owed. The withheld amount represents the amount Gerawan estimates is used for research and promotion of nectarines and peaches. (Tr. 339.)

14. Gerawan has refused to pay its assessments under the Nectarine Order and the Peach Order in full since 2001. For the 2001-2002 marketing year, Gerawan failed to pay $246,052.85 on peaches and nectarines that it shipped (CX 66). For the 2002-2003 marketing year, Gerawan failed to pay $242,639.27 in assessments for peaches and nectarines that it shipped (CX 71). As of October 13, 2005, Gerawan Farming, Inc., had failed to pay $1,391,981.97 in assessments on peaches and nectarines that it had shipped since May 31, 2001 (Status Report dated October 13, 2005).

Conclusions of Law

1. The AMAA specifically authorizes the Secretary of Agriculture to establish or provide for the establishment of marketing research and development projects designed

to assist, improve, or promote the marketing, distribution, and consumption of certain agricultural commodities, including nectarines and peaches grown in California (7 U.S.C. § 608c(6)(I) (Supp. V 2005)).

2. The AMAA provides that the expense of marketing and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of certain agricultural commodities, including nectarines and peaches grown in California, is to be paid from funds collected pursuant to marketing orders (7 U.S.C. § 608c(6)(I) (Supp. V 2005)).

3. Pursuant to the Nectarine Order (7 C.F.R. pt. 916) and the Peach Order (7 C.F.R. pt. 917), Gerawan is compelled to pay for the promotion of nectarines and peaches.

4. The Nectarine Order and the Peach Order are comprehensive regulatory programs that have displaced many aspects of independent business activity. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

5. Compelled funding of advertising that is part of comprehensive regulatory programs, such as the Nectarine Order and the Peach Order, does not implicate the First Amendment right to freedom of speech of those compelled to fund the advertising. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

6. Pursuant to the Nectarine Order and the Peach Order, Gerawan is compelled to pay for government speech with which it does not agree. Gerawan is not actually

compelled to speak when it does not wish to speak, because advertising under the Nectarine Order and the Peach Order is not attributed to Gerawan; Gerawan is not identified as the speaker; and Gerawan is not compelled to "utter" the message with which it does not agree.

7. Gerawan has no constitutional right to avoid paying for government speech with which it does not agree. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. at 559.

8. The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. at 562.

9. In light of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), Gerawan's Petition, filed August 13, 2001, must be denied.

10. Gerawan's failure to pay assessments for the promotion of nectarines and peaches violates the Nectarine Order and the Peach Order.

For the foregoing reasons, the following Order is issued.

ORDER

1. The relief requested by Gerawan is denied. Gerawan's Petition, filed August 13, 2001, is dismissed with prejudice.

2. Gerawan, its agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall comply with the AMAA, the Nectarine Order, and the Peach Order and, in particular, shall cease and desist from failing to pay timely its assessments under the Nectarine Order and the Peach Order.

3. Gerawan shall pay all of its past due assessments and applicable interest and late payment charges under the Nectarine Order to the Nectarine Administrative Committee. The past due assessments, interest, and late payment charges shall be paid by certified check or money order and shall be sent to the Nectarine Administrative Committee.

4. Gerawan shall pay all of its past due assessments and applicable interest and late payment charges under the Peach Order to the Control Committee. The past due assessments, interest, and late payment charges shall be paid by certified check or money order and shall be sent to the Control Committee.

5. Gerawan is assessed a civil penalty of $100,000. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Sharlene Deskins
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 2343 South Building
Washington, DC 20250-1417

6. This Order shall become effective 60 days after service of this Order on Gerawan.

RIGHT TO JUDICIAL REVIEW

Gerawan has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Gerawan's principal place of business is located (7 U.S.C. §§ 608c(14)(B), 608c(15)(B) (Supp. V 2005)).

Done at Washington, DC

May 9, 2008

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William G. Jenson
Judicial Officer